

Reconceptualization of Testing Government Regulations in Place of Legislation in the Constitutional Court in the Perspective of Emergency Rule Law in Indonesia

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Abstract

The Basic Law of 1945 provides for two matters of urgency, namely in Article 12 which gives authority to the President in establishing the circumstances of danger and Article 22 which is the constitutional basis for establishing Government Regulations in place of the Act by the President. The objective measure of issuing Perppu has been formulated by the Constitutional Court (MK) in Court Decision Number 138/PUU-VII/2009. This study aims to analyze the conceptual basis of constitutional testing of Perppu by the Constitutional Court, as well as the nature or content of the state emergency that gives rise to a coercive crunch. The research method used in this study is normative jurisprudence, that is, research that in its study with reference and bases on norms and legal norms, the principles of good legislation. This writing is intended to seek constitutional conceptuality of a fundamental nature in accordance with the principles of the establishment of good legislation in establishing Perppu by the President and testing Perppu in the Constitutional Court. Perppu's charge material giving it a parallel status with the Act, certainly does not necessarily confer legitimacy for Perppu in testing in the Constitutional Court. The practice of statehood in terms of testing Perppu without changing the provisions of the NRI Constitution of 1945, needs to be reconceptualized so that the implementation of the concept of the state of law enshrined in the constitution can be realized.

Keywords: Reconceptualization, Testing, Perppu, Emergency Ordinance Law, Constitutional Court.

INTRODUCTION

The history of the Republic of Indonesia from the beginning of independence to the present, has never been separated from various events and events of an extraordinary nature, both in the political, economic, and social spheres. Political turmoil comes from one period of time to another. Social turmoil, bloody riots in different regions are also very frequent everywhere. Likewise, natural disasters can come from humans or animals, as well as symptoms of health pandemics that pose a real threat to human survival. In the practice of state administration or government, there are often anomalies in the organization of state life, in which the usual legal system is not able to accommodate the interests of the state or society and therefore requires its own arrangements to set in motion the functions of the state in order to be effective in order to guarantee respect for the state and the fulfillment of the fundamental rights of citizens. Thus, the use of ordinary legal instruments from the outset must anticipate various possible circumstances of an abnormal nature in order for the state to guarantee the survival of nations and states.

As a country based on the Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia law, Indonesia has a rule of law that serves as an umbrella for the implementation of emergencies. Law No. 74 of 1957 distinguishes the state of danger into two, namely the state of emergency and the state of war. Commission No. 23 of 1959 distinguishes three levels of danger, namely civil emergency, military emergency and state of war. From the end of 1959 until now, the legal basis for applying the state of emergency is Perpu No. 23 of 1959. Meanwhile, the most recent rules regarding the state of emergency are Law No.24 of 2007 on Disaster Management and Law No.6 of 2018 on Health Quarantine. In Indonesia, emergencies are distinguished according to their level of danger, namely civil emergency, military emergency, and war emergency. Law No. 23 of 1959 uses three criteria to determine a state of emergency. First, security and legal

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order in all or part of Indonesia are threatened by insurgencies, riots or natural disasters so that they cannot be overcome by ordinary equipment. Secondly, there is a war or danger of war or fear of rape of Indonesian territory in any way. Thirdly, the life of the state is in danger or special circumstances turn out to exist or even present symptoms that can harm the life of the state. Jimly argued that the system of legal norms used in countries under normal circumstances and countries in abnormal conditions should be different. In a situation of danger or emergency, normal legal norms cannot be interpreted as instruments to cope with the situation. It needs its own legal norms that can cope with emergencies. Included in terms of the role of state fittings.

The Basic Law of the Republic of Indonesia of 1945, there are two provisions regarding emergency (danger) set out in two articles, namely Article 12 and Article 22. In Article 12 of the 1945 Constitution states, "The President declares the state of danger, the conditions and consequently the state of danger are established by the Act". Then Article 22 (1) of the 1945 Constitution states, "In the event of a forced crisis, the President has the right to establish government regulations in lieu of legislation".

From the above provisions, it can be noted that there are two categories of circumstances according to the 1945 Constitution, namely (1) the state of danger and (2) the issue of coercive stress. The legal terms used in the two articles are clearly different, the former using the term "state of danger" which is nothing but the same as an emergency. While the second uses the term "coercive crunch", what is debated is whether the word *ikhwal* is the same as the sense of state, of course the two terms are different, the state is the structure, while the *ikhwal* thing is the content. Nevertheless, in practice both can contain the same practical meaning. Therefore, the state of danger is sometimes considered to be the same as the harm or vice versa. The provisions concerning Article 12 and Article 22 paragraph (1) of the 1945 Constitution are in anyway related also to Article 10 is The President holds supreme power over the Army, Navy and Air Force and Article 11 UUD 1945 is Paragraph (1) The President, with the approval of the House of Representatives, declares war, makes peace and makes agreements with other countries. Paragraph (2) The President, when making other international agreements which have broad and fundamental consequences for the lives of the people, which are related to the financial burden of the state, and/or requires changes or the formation of laws must be approved by the House of Representatives. Paragraph (3) Further provisions regarding international agreements are regulated by law.

In countries with a presidential system, this type of power is known as the president's legislative power, which is the power of the president exercised in the legislature. In addition to presidential decrees or emergency decrees, the powers that can be grouped in this type include the power of the president to veto the legislative process in parliament, the power to propose initiatives in the draft legislation in certain areas, the power to determine the priority of the discussion of draft legislation, to hold referendums or plebiscites, and special powers in the formation of the state Budget (Payne et al., 2007). In fact it is specified in detail those materials that may be regulated through this emergency regulation. Not all issues can be regulated through *perppu* because there are materials that are considered potentially misused for the political benefit of the executive power and there are materials that affect the value of community justice due to limited public participation in the formation of *Perppu* (Fitra, 2018).

In its development, the establishment of *Perppu* was not only the norm in emergencies, but also loaded with political importance. So is the process of testing *Perppu* in the Constitutional Court which still arouses debate. Since 2009, there have been at least 24 petitions related to *perppu* testing filed with the Court. Of the 24 applications, 19 were declared inadmissible; 4 (four) applications were withdrawn; and 1 (one) was rejected.

The 1945 Constitution has expressly designed the distribution of authority to conduct regulatory testing (judicial review) in Article 24A paragraph (1) for the Supreme Court (MA) and Article 24C paragraph (1) for the Court. According to the provisions of Article 24A paragraph (1) it is affirmed, "The Supreme Court is authorized to adjudicate at the cassation level, test the rule of law under the law against the law, and have other powers conferred by the law." Then in Article 24C paragraph (1) it is affirmed, "The Constitutional Court is authorized to adjudicate at the first and last instance whose verdict is final to test the law against the Basic Law.

In Article 10 (1) letter a of Law No. 24 of 2003 on the Constitutional Court, it is affirmed, "The Constitutional Court is authorized to adjudicate at the first and last instance the verdict of which is final in order to test the law against the Basic Law of the State of the Republic of Indonesia of 1945." From the provisions of the 1945

Constitution as well as in Law No. 24 of 2003, Law No. 4 of 2004 and Law No. 5 of 2004 and Law No. 3 of 2009, no norms were found that expressly regulate the authority of judicial institutions to test Government Regulations in place of the Law (Perppu).

Ni'matul Huda affirmed against the basis of juridical argumentation of constitutional judges to test Perppu. If we look at the provisions of the 1945 Constitution, there is a provision of Article 22 that governs the President's authority to issue a Perppu, if an urgent situation arises, which the 1945 Constitution calls "In the event of a crisis that forces the President to issue government regulations in place of legislation. Perppu must get the approval of Parliament in the following proceedings. If it doesn't get approval, then government regulations should be repealed (Huda, 2010). Therefore, it should be the Parliament that has the authority to conduct a political review of Perppu. Juristically, whether Perppu needs to be tested through testing in court (judicial review).

The Constitutional Court, through its ruling Number 138/PUU-VII/2009, also stated that as for the issuance of Perppu as a condition for the existence of a coercive crunch as referred to by Article 22 paragraph (1) of the 1945 Constitution, namely:

The existence of circumstances, namely the urgent need to resolve legal issues quickly under the Act;

The required Act does not yet exist so that there is a legal vacuum, or there is an Act but it is inadequate;

Such legal emptiness cannot be overcome by making the Act by ordinary procedure as it will take a considerable amount of time whereas such urgent circumstances need certainty to be resolved.

The requirement of "coercive crunch" in practice appears to be the only indicator of testing of a perppu by Parliament because Parliament cannot make changes to the perppu material. Provisions in Article 52 paragraph (3) of Law No. 12 of 2011 Jo. Law No.15 of 2019 on the Establishment of Legislation Regulations, mentions that "Parliament only gives consent or does not give consent to Government Regulations in place of the Act". This arrangement when viewed from the context of the executive and legislative relations as analyzed above does make the president's position as the controller of the legislative agenda in parliament. The position of parliament is not only passive but also relative only as a legitimizer of the will of the government in shaping policy. In the policy material contained in Perppu, this provision is certainly problematic for Parliament. Parliament cannot make the option of accepting with changes to Perppu that the government has promulgated. So Parliament only tests the terms "force crunch" of a perppu, not the material. The House is unlikely to have the attitude of accepting the occurrence of a "forcing crunch" but not approving the arrangements the president's in-do in dealing with it (Huda, 2010).

In the practice of testing Perppu in the Constitutional Court since 2009, never has the Constitutional Court granted the application for testing Perppu. As for the things that made Perppu's test application rejected by the Constitutional Court, among them it has no legal standing, given that Parliament had first given approval for Perppu to be made into law. Therefore, it is necessary to re-establish the conceptualization of Perppu testing in the Constitutional Court in the perspective of emergency state law. It is intended to give time for the enactment of a Perppu, given that Perppu is published none other than to cope with emergencies and force crises. Based on the description of the above problems, the problem formulation in this study, is what is the urgency of re-conceptualizing Perppu testing in the Constitutional Court in the perspective of Emergency State Law and how is the reconceptualization of Perppu testing in the perspective of Emergency State Law?

Research Methods

Legal research is actually related to how to understand the law (Hanifah & Purba, 2023). This study is a type of normative legal research, with the focus of the study examining and reviewing the Perppu Test in the Constitutional Court in the perspective of emergency rule law. The approaches used in this study are (i) the philosophical approach, which was used to analyze the urgency of the reconceptualization of Perppu testing in the Constitutional Court in the perspective of emergency state law; (ii) the statute approach and the comparative approach used to correlate the urgency of the reconceptualization of Perppu testing in the

Constitutional Court; and (iii) the conceptual approach used to propose the conceptualization of testing Perppu in Court Constitution in the legal perspective of the state system.). The data collection used is legal research, meaning that the research is applied or applied specifically to legal science ((Hanifah & Purba, 2023).

DISCUSSION

State of Law

The state as an organization of power has the means to realize the state's goals and desires (*staatswill*). The concept of state institutions terminologically has a variety of terms. In English libraries, the designation of state institutions uses the term “political institution”, while in Dutch librarianship it is known as “*staat organen*”, while in Indonesian, the term “state institution, state body, or organ of the state” is used.

In the 1945 Constitution, the terms of state institutions are inconsistent in their mention. The only explicit mention of state institutions is contained in Article 24C paragraph (1) of the 1945 Constitution, which states “The Constitutional Court is authorized to adjudicate, to resolve disputes over the authority of state institutions...”. Despite the many variants of the terms of state institutions, Kelsen gave direction in this regard. He mentions that “Whoever fulfills a function determined by the legal order is an organ” (8) That is, the organ of the state is not always organic. In addition to organically shaped organs, more broadly, any job prescribed by law can also be called an organ, provided that its functions are norm-creating and/or norm-applying.

In addition to this broad sense, Kelsen also elaborated on the existence of a state organ in a narrow sense, that is, an organ in the material sense. An individual is said to be an organ of the state only if he personally has a specific legal position. A civil law transaction, for example, a contract, is an act or deed that creates law as does a court decision.

In Indonesia, state institutions that are regulated and formed by Undang Undang Basar are constitutional organs, while those formed under the Act are organs of law, while those that are only formed due to presidential decrees are certainly lower in the level and degree of legal treatment of officials sitting in them. Similarly, if the institution in question is formed and given power under the Regional Regulations, it is necessarily even lower in level. In any discussion of the organization of the state, there are two fundamental elements that are interrelated, namely the organ and the function. The organ is its form or container, while the function is its content; the organ is the status of its form (English: form, German: *vorm*), while the function is the movement of that container according to the intent of its formation.

In the text of the Basic Law of the State of the Republic of Indonesia of 1945, the organs in question, some are explicitly called by name, some are explicitly mentioned only their functions, and there are institutions or organs that are called neither by name nor their functions or authority will be regulated by lesser regulations. Sri Soemantri stated, that the institutions of the state are the institutions specified in the constitution. This refers to the opinion of K. C. Wheare, that the constitution is used to describe the entire system of statehood of a country. This means constitution as the framework of the state contains the institutions of the state. These institutions perform separate functions and have a system of checks and balances, including legislative, executive, and judicial functions.

According to Julius Stahl, the concept of the State of Law that he referred to by the term “*rechtsstaat*” included four important elements, i.e (Asshiddiqie, 2009). Protection of human rights; Division of powers; Governance by law; Administrative judiciary of the state. A. V. Dicey, elaborated on the existence of three important features in every State of Law which he refers to as “The Rule of Law”, ((Asshiddiqie, 2004). Supremacy of Law; Equality Before The Law; Due Process of Law. The four principles of “*rechtsstaat*” developed by Julius Stahl can be combined with the three principles of the “Rule of Law” proposed by A. V. Dicey to achieve the characteristics of the modern State of Law. In addition, by “The International Commission of Jurists”, the principles of the State of Law also include, (1) the state must be subject to the law; (2) the government respects the rights of the individual and (3) the judiciary is free and impartial.

Each country is constantly aware of the threat of danger that brings the country into a situation of “emergency” and requires that it be addressed. In a country based on constitutionalism and the rule of law, the means of

dealing with emergencies, both substantive and procedural, must re-main based on the principles or principles of those two teachings (Manan & Harijanti, 2017). In the order of Indonesian legislative regulations, we know the Government Regulations Replacing the Act (Perppu). Perppu is a constitutional right of the president granted by the 1945 Constitution as enshrined in Article 22 paragraph (1) of the 1945 Constitution, that the President has the right to appoint Perppu in the event of a coercive crunch.

Legal Norm Testing

Hans Kelsen posits that in the formation of statutory regulation the theory of legal levels (Stufentheorie) is known. In this theory Hans Kelsen argues that legal norms are tiered and layered in a hierarchy (order) in the sense that a higher norm prevails, originates and is based on an even higher norm, and thus comes to a norm that cannot be traced further and is hypothetical and fictitious, namely the Basic Norm (Grundnorm).

“The ‘grundnorm’ is not constitution, it is simply the presupposition, demanded by the-ory, that this constitution ought to be obeyed (Dias, 1985). (The Basic Norm is the highest norm in a system of norms that are no longer formed by a higher norm, but that Basic Norm is established first by society as a Basic Norm which is dependent on the norms that are subordinate to it, so that a Basic Norm is said to be pre-supposed) (Soeprapto, 2010).

The legal norm according to Hans Kelsen is always sourced and based on the norm above it, but down the legal norm it also becomes the source and is the basis for the lower norm thereof. In terms of the structure/hierarchy of the norm system, the highest norm (the Basic Norm) beco-mes the place where the norms below it hang, so that if the Basic Norm changes, the system of norms that exist below it will be broken (Soeprapto, 2010).

The terms of testing legal norms (statutory regulation) can be divided by subject and object of regulation (Sutiarnoto et al., 2019). Judging by the subject performing the test, testing can be done by a judge (toetsingsrecht van de rechter or judicial review), testing conducted by the legisla-ture (legislative review) and testing by an executive agency (executive review) (Asshiddiqie, 2008). Another understanding states that there are three broad categories in the testing of state laws and administrative acts, namely: judicial review, political review, and testing by state offi-cials or administrative bodies (administrative review).

In the study of Toetsingsrecht (right to test) in Dutch librarianship terms, the right to test is then divided into formal testing rights (formele toetsubsrecht) and the right to test material (mate-riële toetsingsrecht) (Farida, 2003). The right to test the form is the authority to assess whether a legislative product is formed through an appropriate procedure according to the law, while the right to test the material is the authority to investigate and then assess whether the legal product of its content conforms to or contravenes the regulations of a higher degree (Farida, 2003).

Although judicial review and toetsingsrecht have different developmental histories, the es-sence of these two terms is almost the same: testing legal products. The development of law and regularity in the issue of testing legal products by judicial institutions is what has not only influ-enced the establishment of the Court in the world and especially in Indonesia (MK Procedural Law Drafting Team, 2010).

In the tradition of Continental Europe, legal testing is centralized by a single body known as centralized judicial review. Testing by such specialized institutions was first proposed by Pro-fessor Hans Kelsen. According to him, in a country of law, it is important to have a centralized ju-dicial review held by one specialized body. Kelsen, who was instrumental in the formation of the Austrian constitution, tried to introduce a special judicial review institution called the “verfas-sungsgerichtshof” or Court of Constabulary (Asshiddiqie, 2004). The proposal of his idea was ac-cepted, later formulated in the Austrian constitution. Although before this idea, Austria had recog-nized the authority to adjudicate disputes between citizens and governments related to the protec-tion of political rights, even for state courts there was the authority to decide constitutional objec-tions raised by citizens to state actions (Safaat, 2011). However, the authority rests with the Aus-trian MA, while Kelsen's idea was the establishment of a special institution namely the Court to conduct judicial review of legal products.

Since then, the brilliant idea has subsequently become a hot talk among Continental Euro-pean scientists (Syahriza, 2011). Jimly Asshidiqie said that it was the Austrian state that was the pioneer state for the formation of the Court as set out in the 1920 Basic Law of Austria ((Syahriza, 2011). After the establishment of the Court in Austria, similar courts emerged in several countries, including Indonesia. In 2003, Indonesia formed the MK. According to Jimly Asshidiqie, by that year there had been 78 countries that had a stand-alone Constitutional Court outside the structure of the Supreme Court (Asshiddiqie, 2012).

Emergency State Law

According to Sihombing (1996), Emergency laws can be distinguished or classified according to their pattern, form and source, among others: first objective emergency law (objectieve staatsnoodrecht), second subjective emergency rule law (subjectieve staatsnoodrecht), third written emergency state law (geschreven staatsnoodrecht), fourth unwritten emergency rule law (ongeschreven) staatsnoodrecht). From the formal point of view of its content, namely from the level of emergency danger in the state of emergency it can be stated: the law of emergency rule, the level of civil emergency, martial law, and the state of war.

The state of emergency or “State of Emergency”, refers to almost the same sense, that is, a state of danger that suddenly threatens the general order, which demands the state to act in atypical ways according to the rule of law that normally prevails under normal circumstances. Some of the terms used are : (Asshiddiqie, 2008)

State of emergency; State of civil emergency; Stage of siege (etat d'siege); State of war; State of internal war; State of exception (etat d'exception, regime d'exception); State of alert; 8) State of exepcion (expectional circumstances); State of sitio (siege); State of public danger; State of public emergency; State of catastrophe; State of defence; State of tension; State of alarm; State of urgency (etat d'urgence); State of national defence; State of national necessity; State of special powers; State of suspension of guarantee (suspension of individual security); General or partial mobilisation; Military re-gime; Martial law; Emergency provision; State of danger (in Article 12 of the 1945 Constitution); Extraordinary circumstances; State of maximum distress (in Article of the 1945 Constitution).

The elements of the Emergency Ordinance are (i) the existence of a state hazard that deserves extraordinary effort; (ii) ordinary, common and customary efforts are inadequate to be used to respond to and address the existing danger; (iii) the extraordinary authority granted by law to the state government to promptly terminate the emergency danger and return to normal life; and (iv) the extraordinary authority and emergency rule law apply for a while only until that emergency is seen as doing no harm anymore.

According to Article 40 of the ICCPR (International Covenant on Civil and Political Rights), member states that are party to the covenant or have ratified it are also required to submit reports, especially if requested by the United Nations Human Rights Committee, or at a five-year period. Under Article 41 of the ICCPR, the UN Human Rights Committee is empowered to make “general comments” on human rights conditions in each member state, including human rights conditions during the entry into force of a state of emergency. Once a state of emergency has been declared and promulgated, the emergency notification script also needs to be notified and formally submitted to the UN General Secretariat (Asshiddiqie, 2008).

After the perppu has been committed the perppu must be referred to a hearing of the Parliament. Perppu must get approval from Parliament in the following trial. If in such session the Parliament approves, the perppu may be set into law, but if in the hearing the DPR does not approve the perppu proposed by the Government, then the perppu shall be repealed. Since the use of this authority is solely determined by the President, so that subjective considerations can be used as a reason for setting the term, it is here that the approval of the Parliament is important (Huda, 2003).

CONCLUSION

Under the provisions of the NRI Basic Law 1945, it does not provide standing for the Constitutional Court to be authorized in the testing of Perppu. This is because the NRI Constitution of 1945 expressly provides that the one authorized to 'test' Perppu is the Parliament. Perppu's charge material giving it a parallel status with the Act, certainly does not necessarily confer legitimacy for Perppu in testing in the Constitutional Court. The

practice of statehood in terms of testing Perppu without changing the provisions of the NRI Constitution of 1945, needs to be reconceptualized so that the implementation of the concept of the state of law enshrined in the constitution can be realized. Moreover, the MPR, which is given the authority to amend and establish the NRI Constitution of 1945, needs to provide constitutional arguments to determine whether it is necessary or not to grant authority to the Constitutional Court without amending the 1945 Constitution.

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